

Text of Minority's Proposed Amendment to Rule 1.6

A. With mark-ups shown

Deletions are shown by ~~strikeouts~~. Additions are shown by underline.

Rule 1.6. Interactive ~~audio and~~ audiovisual devices

a. General Provisions. At those proceedings specified in paragraphs (c)(1) and (2) below, ~~When the appearance of a defendant or counsel is required in any court, subject to the provisions of this rule, the appearance~~ may be made in any court by the use of an interactive audiovisual device, including videoconferencing equipment. An interactive audiovisual device shall at a minimum operate so as to enable the court and all parties to view and converse with each other simultaneously. Any interactive audiovisual device shall meet or exceed minimum technical specifications adopted by the Administrative Office of the Courts and no videoconference shall occur under circumstances that do not meet these standards.

b. Requirements. In utilizing an interactive audiovisual device all of the following are required:

(1) A full record of the proceedings shall be made as provided in applicable statutes and rules; ~~and.~~

~~(2) The court shall determine that the defendant knowingly, intelligently and voluntarily agrees to appear at the proceeding by an interactive audiovisual device; and~~

~~(2)(3)~~ Provisions shall be made to allow for confidential communications between the defendant and counsel prior to and during before, during and after the proceeding; ~~and.~~

(3) In cases requiring interpreters for non-English speaking or hearing-impaired defendants, absent compelling circumstances, the interpreter shall be present with the defendant, and provisions shall be made to enable simultaneous appearance of both the defendant and interpreter.

(4) Provisions shall be made to allow a victim a means to view and participate in the proceedings, including participation through videoconferencing when available.; ~~and~~

(5) Provisions shall be made to ensure compliance with all victims' rights laws.

(6) Provisions shall be made for the public to view the proceedings, as provided by law.

c. Proceedings. ~~Appearance by interactive audiovisual device, including videoconferencing, shall be permitted in the discretion of the court at any proceeding except that:~~

~~(1) Written stipulation of the parties is required in all proceedings prior to the commencement of the proceeding, except in initial appearances and not guilty arraignments; and~~

Videoconferencing Permitted in the Sole Discretion of the Court: In the sole discretion of the court, videoconferencing may be allowed at the following proceedings: not guilty arraignments held pursuant to Rule 5.8, Rules of Criminal Procedures; omnibus hearings held pursuant to Rules 16.3(a)(3), 16.3(a)(4), and 16.3(d), Rules of Criminal Procedure; informal conferences held pursuant to Rule 32.7, Rules of Criminal Procedure; and pretrial conferences, and motions to continue, which are limited to setting trial dates that do not entail any waiver of time pursuant to Rule 8, Rules of Criminal Procedure.

(2) ~~This Rule 1.6 shall not apply to any trial, evidentiary hearing or probation violation hearing; and~~ **Videoconferencing Permitted upon Stipulation of the Parties:** Upon stipulation of the parties and a knowing and intelligent waiver of personal appearance by the defendant, videoconferencing may be permitted at any other proceeding, except as set forth in paragraph (3) below. Except in the case of initial appearances, stipulation by the parties to videoconferencing shall be provided in written form prior to the commencement of the proceeding.

(3) ~~This Rule 1.6 shall not apply to any felony sentencing.~~ **Videoconferencing Not Permitted:** Absent compelling circumstances and a knowing and intelligent waiver of personal appearance by the defendant, videoconferencing shall not be permitted at any trial, contested probation violation hearing, probation disposition hearing or felony sentencing.

(4) **Expansion of Scope of Proceeding:** Notwithstanding the foregoing, the court shall reschedule a videoconference to require the defendant's personal appearance if the scope of the hearing expands beyond that specified in paragraphs (1) and (2) above.

Committee Comment to 2009 Amendments

A criminal defendant has the right to appear in person and by counsel in criminal proceedings. Ariz. Const. Art. 2 § 24. The scope of the right to be present is further defined in *State v. Schackart*, 190 Ariz. 238, 255 ¶ 16, 947 P.2d 315, 332 (1997), wherein the Arizona Supreme Court stated: "We have adopted the view that a defendant also has the right to attend those proceedings where "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."'" Quoting *State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981). The 2009 amendments attempt to balance the right of a defendant to be present in person against the potential of video technology to increase the efficiency of the court, lower transportation costs and enhance security. Strict adherence to the technical standards referenced in paragraph (a) is critical not only to the constitutional rights of the defendant, state and victims, but to the dignity and decorum of the judicial proceedings.

Paragraph (b)(2) addresses the need for ongoing confidential communications between the defendant and defense counsel in light of the difficulty of such communications when a defendant is at a remote location.

Paragraph (b)(3) addresses the use of interpreters. Simultaneous interpretation is a difficult skill to master even when all parties are present in the courtroom. Having an interpreter attempt to translate at a location remote from the defendant exacerbates what is already a difficult task and should, therefore, be avoided.

The purpose of paragraphs (b)(4) and (b)(5) is to enable victims to participate by videoconferencing, if possible, and to ensure that the use of videoconferencing does not impede victims' rights. Paragraph (b)(6) focuses on the problem of ensuring that public access to proceedings, to the extent possible, is not compromised by the use of videoconferencing.

Paragraph (c) establishes a three-tiered procedural framework for defining proceedings at which videoconferencing is permitted. Paragraph (c)(1) lists those proceedings that can occur irrespective of defendant's consent. It is designed to reflect the constitutional standard set forth in *Schackart, supra*. Paragraph (c)(2) provides for a greatly expanded scope of videoconferencing, as it encompasses matters at which the defendant voluntarily agrees to appear by videoconference. Paragraph (c)(3) recognizes, however, that absent compelling circumstances a defendant must be personally present at trials, felony sentencings, contested probation violation hearings and probation dispositions, even if the parties and the court might desire to stipulate to use of videoconferencing. Examples of compelling circumstances would be a defendant having a communicable disease constituting a threat to public health or a defendant being held in custody at an out-of-state facility. Paragraph (c)(4) addresses the situation where the scope of a hearing at which a defendant appears by videoconference expands beyond that which was originally anticipated by the parties.

B. without mark-ups

Rule 1.6. Interactive audiovisual devices

a. General Provisions. At those proceedings specified in paragraphs (c)(1) and (2) below, the appearance of a defendant or counsel may be made in any court by the use of an interactive audiovisual device, including videoconferencing equipment. An interactive audiovisual device shall at a minimum operate so as to enable the court and all parties to view and converse with each other simultaneously. Any interactive audiovisual device shall meet or exceed minimum technical specifications adopted by the Administrative Office of the Courts and no videoconference shall occur under circumstances that do not meet these standards.

b. Requirements. In utilizing an interactive audiovisual device all of the following are required:

(1) A full record of the proceedings shall be made as provided in applicable statutes and rules.(2) Provisions shall be made to allow for confidential communications between the defendant and counsel before, during and after the proceeding.

(3) In cases requiring interpreters for non-English speaking or hearing-impaired defendants, absent compelling circumstances, the interpreter shall be present with the defendant, and provisions shall be made to enable simultaneous appearance of both the defendant and interpreter.

(4) Provisions shall be made to allow a victim a means to view and participate in the proceedings, including participation through videoconferencing when available.

- (5) Provisions shall be made to ensure compliance with all victims' rights laws.
- (6) Provisions shall be made for the public to view the proceedings, as provided by law.

c. Proceedings.

- (1) **Videoconferencing Permitted in the Sole Discretion of the Court:** In the sole discretion of the court, videoconferencing may be allowed at the following proceedings: not guilty arraignments held pursuant to Rule 5.8, Rules of Criminal Procedures; omnibus hearings held pursuant to Rules 16.3(a)(3), 16.3(a)(4), and 16.3(d), Rules of Criminal Procedure; informal conferences held pursuant to Rule 32.7, Rules of Criminal Procedure; and pretrial conferences, and motions to continue, which are limited to setting trial dates that do not entail any waiver of time pursuant to Rule 8, Rules of Criminal Procedure.
- (2) **Videoconferencing Permitted upon Stipulation of the Parties:** Upon stipulation of the parties and a knowing and intelligent waiver of personal appearance by the defendant, videoconferencing may be permitted at any other proceeding, except as set forth in paragraph (3) below. Except in the case of initial appearances, stipulation by the parties to videoconferencing shall be provided in written form prior to the commencement of the proceeding.
- (3) **Videoconferencing Not Permitted:** Absent compelling circumstances and a knowing and intelligent waiver of personal appearance by the defendant, videoconferencing shall not be permitted at any trial, contested probation violation hearing, probation disposition hearing or felony sentencing.
- (4) **Expansion of Scope of Proceeding:** Notwithstanding the foregoing, the court shall reschedule a videoconference to require the defendant's personal appearance if the scope of the hearing expands beyond that specified in paragraphs (1) and (2) above.

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